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Supreme Court, U.S.
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No. 05-1157

IN THE

Supreme Court of the United States

CREDIT SUISSE FIRST BOSTON LTD., *et al.*,

Petitioners,

v.

GLEN BILLING, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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Pursuant to this Court's Rule 15.8, Respondents (plaintiffs-appellants below) respectfully address the new matters raised in the Brief of the United States filed November 9, 2006 ("U.S. Br.").

The U.S. argues that the petition should be granted but then apparently disagrees with Petitioners' main immunity arguments throughout this case. The U.S. substitutes, instead, a pleading standards argument that was never raised by the parties, never raised by an amicus, never considered by any Court below and has never been considered by any court in the United States. *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992) (declining to address an issue that "we would apparently be the first court in the Nation" to consider).

Granting certiorari to consider the United States' novel proposed pleading standard argument would violate Rule 14.1(a) (*see* "B" below) in order to consider an unprecedented standard that is contrary to decades of precedent by this Court. *See* "C" below.

A. Background

Respondents have alleged "an epic Wall Street conspiracy"[1] in which the ten largest investment banks conspired to require from customers tie-in consideration (the "anti-competitive charges") for allocations of shares of certain initial public offerings ("IPOs") and to inflate the aftermarket prices of those securities above the IPO price. *See* Consolidated Amended Class Action Complaint (Jan. 2, 2002) ("C") ¶¶ 1, 4(a), 4(b), 41-42, 65-66.

Consistent with decades of precedent from this Court, the United States[2] was quite clear in its brief to the Court of Appeals for the Second Circuit, that such a conspiracy was not impliedly immune from prosecution under the antitrust laws and that **any** "allegations in the complaint" involving

1. *Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130, 136 (2d Cir. 2005) ("*Billing*"); App. 1a.

2. The Department of Justice noted that it had reviewed the amicus brief previously filed by the Securities and Exchange Commission (the "Commission"), and distinguished the Commission's brief from its own in part by noting that "that brief (unlike this brief for the United States) was not approved by the Acting Solicitor General and does not state the views of the United States." App. 200a at n. 1.

permissible activity would justify immunity "only to the minimum extent necessary." *E.g.*:

> [T]he securities laws and SEC regulations have long prohibited tying and laddering because of the serious threats such practices pose both to competition and to . . . the securities markets. . . . [T]he Commission has never authorized tying and laddering, nor has it even considered doing so. Accordingly, the United States believes there is no demonstrated 'potential for regulatory permission of the conduct at issue. . . .'
>
> . . . . Because '[t]he antitrust laws represent a fundamental national economic policy,' '[i]mplied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system. . . .'
>
> . . . . And even where conflicts between the antitrust laws and the regulatory scheme **warrant immunity as to some allegations of a complaint**, the 'baseline principle' is that repeal of the antitrust laws is implied 'only if necessary to make the [regulatory law] work' and '**even then only to the minimum extent necessary**. . . .'

App. 201a-203a (footnotes omitted) (citations omitted) (emphasis supplied).[3]

The Second Circuit recited these same immunity standards and adopted the result advocated by the United States.

> [I]t is important to recall that an implied immunity analysis always begins with the notion that repeal by implication is always disfavored. *See Silver*, 373 U.S. at 357, 83 S.Ct. 1246. Nonetheless, implied repeal may arise in the face of a clear repugnancy between antitrust and regulatory provisions **but, importantly, only to the**

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3. The United States also noted below that its proposed immunity standard as an amicus curiae in *In re Stock Exchanges Options Trading Antitrust Litig.*, 317 F.3d 134 (2d Cir. 2003) ("*Options*") was actually more restrictive than that of the Second Circuit. App. 203a n. 3, *id.* 207a. The United States reiterated below its disagreement "with the result in *Options*." App. 203a n. 3; *see also* App. 207a & n. 8.

> **extent necessary to make the regulatory provisions work.** *Id.* at 357, 83 S.Ct. 1246.

426 F.3d at 164; App. 56a-57a (emphasis supplied).[4]

Now, the United States appears to continue to argue that a conspiracy to require tie-in transactions, including laddering, as additional consideration for IPO shares, is not immune from prosecution under the antitrust laws. U.S. Br. at 4 n.2; *see also id.* at 15-16 ("petitioners are also wrong in their view that all conduct connected with initial public offerings is impliedly immune from antitrust liability because the SEC exercises 'pervasive' regulatory authority over it.").

However, the United States has also created a new argument. Petitioners' alleged conspiracy, which the United States has said is not impliedly immune from antitrust prosecution, App. 207a ("the allegations of tying and laddering – practices that are strictly prohibited under the securities laws and that the SEC has never permitted or proposed to permit – should not be dismissed on implied immunity grounds"), should be judged by a novel pleading standard.[5]

Specifically, the U.S. emphasizes that Respondents allege that, among the ways that petitioners entered and implemented the conspiracy, is that Petitioners abused permissible or arguably permissible types of conduct as occasions in which they entered into or implemented the prohibited conspiracy. U.S. Br. at 2-3. The permissible types of conduct which afforded these occasions include defendants' contacts with one another during underwriting syndicates, road shows, and voluntary industry associations.

The U.S. then indulges in the following never-before-permitted prediction. *See* p. 8 *infra*. The alleged conspiratorial

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4. Thus, the Court below recited that "immunity can arise only when there is a potential specific conflict between the antitrust laws and a regulatory regime," (App 57a) which echoed the United States' proposal that "[a]bsent a demonstrated potential for conflict . . . it is presumed that Congress intended that both the regulatory scheme and the antitrust laws apply . . . ." App. 203a. Actually, the U.S. made clear that it favored a higher bar to antitrust immunity but was constrained by the easier test for immunity articulated by the Second Circuit in *Options*. *See* n.3 *supra*.

5. The United States' proposed standard is wholly contrary to decades of precedent and the United States' own "immunity is appropriate only to the minimum extent necessary" position presented to the court below.

conduct in this case will supposedly be so "inextricably intertwined" with permissible conduct that immunity must be granted to the maximum extent possible at the motion to dismiss stage unless respondents can satisfy the following novel pleading standard:

> [T]he complaint must allege facts providing concrete notice and giving rise to a reasonably grounded expectation, *see Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005), that the alleged antitrust offense can be established without relying on activities that are authorized under the regulatory scheme or inextricably intertwined with such immune activities.

U.S. Brief at 13, *see also id.* at 8, 11.[6] The United States cites to no case in which a court has made a prediction at the pleading stage that discovery will prove that a prohibited antitrust conspiracy is "inextricably intertwined" with the permissible conduct that defendants converted into occasions in which to form or implement the prohibited conspiracy. *See* p. 8 *infra*.

B. This Court Should Not Grant Certiorari To Resolve An "Unpresented Question" That Was Neither Raised Nor Considered By Any Court Below Or Elsewhere

Rule 14.1(a) of this Court's Rules states in part: "Only the questions set out in the petition, or fairly included therein, will be considered by the Court." The United States' proposed novel pleading standard presents a "question" not considered by any court below, not raised by any of the parties or other amici, and which has never been previously considered by any court. *See Yee*, 503 U.S. at 519.

The only question before the Court is the assertion of an implied immunity affirmative defense, a procedural inquiry that "'in no way depends on the merits'" of the case.'"

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6. The U.S. incorrectly refers the Court to *Dura*. The actual language from *Dura*, upon which the U.S. relies, is quite different. In *Dura*, this Court identified as one goal of the pleading rules to require *"a reasonably founded hope* that the [discovery] process will reveal relevant evidence." 544 U.S. at 347 (emphasis supplied). Notably, the word "expectation" neither appears in *Dura* nor *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975) to which *Dura* makes reference. This Court was not attempting in *Dura* to state a broad new pleading standard as the U.S. seems to suggest.

Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27, 31 (1993), quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990), in turn quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975). As this Court has made clear in the context of Rule 14.1(a), a matter that is merely "complementary" or "related" to the question presented in the petition for certiorari is not "fairly included therein". *Izumi*, 510 U.S. at 31-32; *Yee*, 503 U.S. at 537.[7]

Thus, "Rule 14.1(a) . . . creates a heavy presumption against our consideration" of questions not directly presented in the certiorari petition. *Izumi*, 510 U.S. at 32; *Yee*, 503 U.S. at 538.[8] Indeed, the Solicitor General has frequently advocated the denial of Supreme Court merits review for this very reason.[9] This Court has often made clear that it will disregard Rule 14.1(a) and consider "unpresented questions" "only in

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7. It makes no difference that the matter was discussed in the briefs submitted. *Izumi*, 510 U.S. at 32 n.5 ("the fact that Izumi discussed this issue in the text of its petition for certiorari does not bring it before us. Rule 14.1(a) requires that a subsidiary question be fairly included in the *question presented* [emphasis original] for our review").

8. *See also Day v. McDonough*, __ U.S. __, 126 S. Ct. 1675, 1680 n.2 (2006) ("This question was not 'set out in the petition [for certiorari], or fairly included therein,' and we therefore do not consider it here. This Court's Rule 14.1(a)"); *Blessing v. Freestone*, 520 U.S. 329, 340 n.3 (1997) ("Petitioner makes two further arguments in her briefs on the merits. . . . We decline to address these questions which were neither raised nor decided below, and were not presented in the petition for certiorari. This Court's Rule 14.1(a)").

9. *See, e.g.*, Brief for the United States in Opposition, *Ohio Environmental Protection Agency v. Nihiser*, Docket No. 01-1357 (May 15, 2002), 2002 WL 32135308 at *16 ("It is the Court's general rule that it will not grant certiorari to address arguments not pressed in, or decided by, the lower courts. [citation omitted] Since this is a court of 'review, not one of first view,' [citation omitted] the failure of petitioner to press any 'relatedness' arguments below denies this Court 'the benefit of a well-developed record and a reasoned opinion on the merits. [citation omitted]"); Brief for the United States in Opposition, *International Business Machines v. U.S.*, Docket No. 00-482 (December 2000), 2000 WL 34000084 at *9 ("Petitioner seeks to raise several other issues that it failed to raise below . . . Especially in view of the fact that neither of the courts below has addressed the issues that petitioner now belatedly seeks to raise, there are no 'exceptional circumstances' that would warrant review by this Court").

the most exceptional cases." *Izumi*, 510 U.S. at 427; *Yee*, 503 U.S. at 535; *Stone v. Powell*, 428 U.S. 481 n.15 (1976); *see also Berkemer v. McCarty*, 468 U.S. 420, 443 n.38 (1984) ("Absent unusual circumstances . . . we are chary of considering issues not presented in petitions for certiorari").[10]

> In fact, were we to address the issue here, we would apparently be the first court in the Nation to determine whether an ordinance like this one effects a regulatory taking.

Yee, 503 U.S. at 538. The United States offers no good reason to depart from this Court's practice. There are many excellent reasons not to.

C. This Court Should Not Grant Certiorari To Impose A Novel Pleading Standard That Would Contravene Decades Of This Court's Prior Decisions

Reaching to grant certiorari in order to consider the United States' novel proposed pleading standard is further inappropriate because such standard is contrary to decades of this Court's precedents regarding (i) affirmative defense and immunity pleading, (ii) substantive antitrust immunity, (iii) antitrust "safe harbors," and (iv) permissible antitrust evidence. The United States would depart from all that precedent in order to solve a predicted "inextricably intertwined" problem that does not now exist and will likely never exist. *See* p. 9 *infra*.

1. The Proposed Novel Standard Is Contrary to Decades of Pleading, Immunity, Safe Harbor, And Evidence Precedent

Pleading Precedent. First, requiring a heightened pleading standard to negate an anticipated affirmative defense contravenes decades of this Court's jurisprudence. When considering affirmative defenses based upon various types of

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10. In *Izumi*, this Court provided the following list of unusual circumstances: 1) overruling previous precedent; 2) deciding cases on nonconstitutional grounds when presented with a constitutional question; 3) absence of jurisdiction issues; and 4) plain error in the record or otherwise. 510 U.S. at 433. The grounds asserted for review by the United States are far removed from any of the enumerated categories in *Izumi* and are without other statutory or case law precedent.

immunity, this Court has made clear that: "a claim of immunity is conceptually distinct from the merits of plaintiff's claim". *Mitchell v. Forsyth*, 472 U.S. 511, 527-28 (1985); *see also Gomez v. Toledo*, 446 U.S. 635, 640 (1980) ("Moreover, this Court has never indicated that qualified immunity is relevant to the existence of the plaintiff's cause of action; instead we have described it as a defense available to the official in question"); *see also Barry Aviation Inc. v. Land O'Lakes Municipal Airport Comm'n*, 377 F.3d 682, 688 (7th Cir. 2004) ("Complaints need not anticipate defenses"); *Xechem, Inc. v. Bristol-Myers Squibb Co.*, 372 F.3d 899, 901 (7th Cir. 2004) (same).[11]

This Court has also consistently "refused to change the Federal Rules governing pleading by requiring the plaintiff to anticipate the immunity defense."[12] *Crawford-El v. Britton*, 523 U.S. 574, 595 (1998); *see also Gomez v. Toledo*, 446 U.S. at 640 ("Since qualified immunity is a defense, the burden of pleading it rests with the defendant [citations omitted]. . . . We see no basis for imposing on the plaintiff an obligation to anticipate such a defense by stating in his complaint that the defendant acted in bad faith").[13]

Substantive Immunity Precedent. Second, imposing the maximum immunity possible at the motion to dismiss stage is contrary to decades of this Court's substantive immunity

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11. Here the District Court properly held that implied immunity was "an affirmative defense that appears on the face of the complaint, and as such is properly addressed at the motion to dismiss stage." *In re IPO Antitrust Litig.*, 287 F. Supp. 2d 497, 501-02 (S.D.N.Y. 2003), App. 77a; *accord, Options*, 317 F. 3d at 150 (same).

12. This Court has also long refused to require heightened pleading standards in addition to the express instances required by Rule 9(b) of the Federal Rules of Civil Procedure. Any such requirement "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993).

13. *See also Thomas v. Independence Township*, 463 F.3d 285, 293-94 n.2 (3d Cir. 2006) ("As stated in *Gomez* and reaffirmed in *Crawford-El*, the burden of pleading qualified immunity rests with the defendant, not the plaintiff. . . . Because we conclude that plaintiffs have no duty to plead allegations in anticipation of a qualified immunity defense, we rather easily conclude that plaintiffs do not have the concomitant duty to do so with particularity").

precedent. As the United States told the Second Circuit, the fundamental importance of the antitrust laws requires that implied immunity be disfavored, such that "even where conflicts between the antitrust laws and regulatory scheme warrant immunity as to some allegations of the complaint," immunity may be implied "only to the minimum extent necessary." App. 202a, citing to *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963); *see* p. 2 *supra*.

In vivid contrast, the sole, wholly unrelated "precedent" cited by the United States as a basis for its novel pleading standard arose from the immunity of **public officials** and holds that the "outer reaches" of their immunity should be protected. U.S. Brief at 11 n.4 (*citing* to *Nixon v. Fitzgerald*, 457 U.S. 731 (1982)). The palpable need to uphold the "outer reaches" of public officials' immunity contrasts sharply with the need to immunize an "epic conspiracy" of profit-oriented private citizens from the "Magna Carta of free enterprise" and the "economic bill of rights". *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972).

Antitrust "Safe Harbor" And Evidentiary Precedent. Third, the United States' novel pleading standard is contrary to numerous safe harbor and evidentiary decisions by this Court and other courts. Far from requiring heightened pleading protection, these decisions have uniformly held that otherwise permissible steps under the antitrust laws may not be abused in order to enter into or carry out a prohibited conspiracy.[14]

14. *See United Mine Workers v. Pennington*, 381 U.S. 657 (1965) (fact that defendants used other conduct permitted under regulatory scheme to engage in conduct prohibited under the regulatory scheme and the antitrust laws would not provide ground for claiming immunity); *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963) (fact that defendants were members of a stock exchange and thereby empowered to communicate with each other to create rules and by-laws governing their relations with the public and with each other was never advanced as a basis for finding applied immunity for alleged anticompetitive collective action in promulgating certain rules); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 379 U.S. 690, 707 (1962) ("it is well settled that acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme [citations omitted]").

(Cont'd)

Finding The Conduct To Be "Inextricably Intertwined" Fails To Draw Reasonable Inferences In Favor Of the Complaint. Fourth, the proposed novel pleading standard tries to solve a problem that does not exist. Respondents obviously do not contend that petitioners be restrained from forming syndicates, conducting road shows, and participating in industry associations.

Instead, Respondents assert that petitioners cannot abuse their participation in permitted activities as occasions in which they form or implement a prohibited conspiracy to inflate their charges or aftermarket prices. It is the activity in forming and implementing the prohibited conspiracy, not the fortuitous factual context in which that activity allegedly occurred, that respondents allege to violate the antitrust laws.

Tellingly, the United States fails to cite to a case where the formation of a prohibited conspiracy during permitted meetings has barred a claim for prohibited activity as a matter of law, has otherwise been held to be "inextricably intertwined" with the prohibited activity, or has impliedly immunized the prohibited activity. U.S. Br. *passim*. There is not now and has never been a safe harbor to convert lawful or immunized activities into occasions in which to hatch or implement prohibited conspiracies. *See* cases collected at note 14 *supra*.

(Cont'd)

See also In re Brand Name Prescription Drugs Antitrust Litig., 186 F. 3d 781, 784-85 (7th Cir. 1999) (cooperative behavior would be permitted under trade association auspices or otherwise and under the antitrust laws provided behavior does not reduce competition among participants); *Ice Cream Liquidation, Inc. v. Land O'Lakes, Inc.*, 253 F. Supp. 2d 262, 267 (D. Conn. 2003) (in case involving alleged collusion to fix prices of certain staple products that were components of a federally regulated formula for minimum milk prices, implied immunity did not apply where plaintiff's challenge was not to the federal milk pricing formula but rather to the defendants' conduct in manipulating the underlying components of the formula); *see also* VII P. Areeda & H. Hovenkamp, *Antitrust Law*, Section 1477 at 315 (2d ed. 2003).

Furthermore, questions of immunity cannot be treated as rules of evidence that exclude proof of an unlawful conspiracy. While such evidence can be excluded under Fed. R. Evid. R. 403 if confusing or unduly prejudicial, there is no blanket rule of inadmissibility. *See In re Brand Name Prescription Drugs*, 186 F. 3d at 789.

Moreover, to characterize the activities as "inextricably intertwined" is to make predictions that are contrary to the well-pled allegations of the amended complaint and to fail to draw reasonable inferences in favor of the amended complaint. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). As with other prohibited conspiracies, this one may be formed or implemented through means that are themselves lawful or unlawful. *E.g., In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655 (7th Cir. 2002) (Posner, J.).

Finally, the United States does not point to any split in the circuits regarding its proposed questions or the question presented by Petitioners. Similarly, the United States does not point to any recurrence of the challenged conduct or of lawsuits alleging that similar "epic conspiracies" have existed or recurred. Given the United States' apparent position that a conspiracy to require tie-ins or laddering does not violate the antitrust laws, there is now absolutely no reason for this Court to become the first Court in the Nation to consider a novel pleading standard that is contrary to so many of this Court's precedents.

CONCLUSION

For the foregoing reasons, and all those stated in the Brief in Opposition, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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